EASTERN REGIONAL INTERSTATE CHILD SUPPORT ASSOCIATION

Office of Child Support Enforcement
Administration for Children and Families
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ERICSA Position Paper for the
Notice of Proposed Rule Making
Flexibility, Efficiency and
Modernization in Child Support
Enforcement Programs
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I. Introduction

The Eastern Regional Interstate Child Support Association (ERICSA) is a not-for-profit organization of child support professionals that promotes the interests of children who are owed child support. ERICSA members work for or with state, tribal and local child support agencies as public or private-sector participants.

Founded in 1963, ERICSA historically has drawn its membership from persons working for or doing business with tribes and states and their local jurisdictions that border on, or are east of, the Mississippi River. ERICSA holds an annual training conference and provides policy positions on key issues affecting child support.

OCSE is proposing changes based on the President's directives in Executive Order 13563: Improving Regulation and Regulatory Review. The NPRM proposes revisions to make Child Support Enforcement

program operations and enforcement procedures more flexible, more effective, and more efficient by recognizing the strength of existing state enforcement programs, advancements in technology that can enable improved collection rates, and the move toward electronic communication and document management. This NPRM proposes to improve and simplify program operations, and remove outmoded limitations to program innovations to better serve families. In addition, changes are proposed to clarify and correct technical provisions in existing regulations. This paper provides ERICSA's comments on issues that are contained in the NPRM.

II. ERICSA's Comments on Specific Proposed Regulations

Section 302.32 – Collection and disbursement of support payments by the IV-D agency. ERICSA supports this proposed regulatory change. We believe it will help end some confusion regarding the collection of support via income withholding orders (IWOs) in non-IV-D cases.

302.33 – Services to individuals not receiving Title IV-A assistance.

(a)(4) – ERICSA supports the proposed revision which we believe will simplify the notification process in post-foster care placement cases.

(a)(6) – ERICSA supports permitting state plans to allow an individual to request limited services. However, we point out that states will incur a significant cost in implementing these changes within their computer systems. ERICSA believes further clarification needs to be provided in inter-state and international cases. What is done if a limited service request is made to a state which does not permit the same in its state plan? ERICSA supports the provision that requires all federally mandated enforcement actions when a limited enforcement action is requested.

302.38 – Payments to the family.

ERICSA supports the concept of requiring SDU payments to be made directly to the family and NOT to private collection agencies. However, ERICSA recommends that the regulation address the treatment of:

1) Interstate/UIFSA cases wherein money is sent to the initiating state SDU;
2) International cases which may order support payment directly to the child;
3) Other "caretaker" situations; ERICSA recommends that the regulation be expanded to permit payment to **court-appointed** financial guardians or financial instruments (such as trusts) that are responsible for providing, or established to provide, financial support to a child or children; and
4) The specific exclusion of private collection agencies as an eligible payee in an open IV-D case.

302.56 – Guidelines.

ERICSA is concerned that the language in the proposed regulation is too prescriptive. Child support guidelines have historically been a state issue with much flexibility, as the guidelines impact both IV-D and non-IV-D cases.

We take issue with the prescriptive language requiring the use of actual income to establish the guideline calculation. This will restrict states' ability to establish support orders when parties choose to avoid the legal system. Imputing of income should be reserved to cases in which no information or limited information could be discovered. Where income is imputed, the support order should include written findings stating the specific reasons for the imputation and the information used for the amount of the imputation. However, in no case should the custodial parent be disadvantaged because the noncustodial parent refused to participate in the support establishment or modification process and disclose income.

Therefore, we request that the change in (c)(1) replacing "all" to "actual" be removed, and that (c)(4) include language that imputing of income is not prohibited when a party refuses to provide information or participate in child support proceedings.

We also provide the following comments related to 302.56 (c) (4) regarding subsistence level/needs. The proposed rule fails to consider the custodial parent's need to provide support to the child(ren) when s/he is also low-income, living at or below the subsistence level. In this situation the proposed rule would place the support burden exclusively on the custodial parent, by negating the noncustodial parent's support obligation. This rule needs to go further and focus on how to equitably divide both parents' obligation to support the minor child(ren), when both are at subsistence level. Finally, the rule needs to provide some flexibility in applying a self-support reserve, particularly where the noncustodial parent's living expenses are being met by another person (e.g., the noncustodial parent's expenses and living arrangements are covered by another person, such as a companion, spouse or parent).

In line with our reasoning that the guidelines must reflect the greater child support community, and not just IV-D cases, 302.56 (c)(3) currently references addressing "how the parents will provide for the child(ren)'s health care needs through health insurance coverage and/or through cash medical support in accordance with § 303.31 of this chapter." Firstly, 303.31 applies only to IV-D cases, and as we reference in our comments on 303.31, that section is out-of-step with the Affordable Care Act. Therefore, at a minimum, we recommend that the language "in accordance with § 303.31 of this chapter" be stricken. OCSE should also consider going further and modifying this requirement to read "how the parents will provide for the child(ren)'s health care needs through public or private health insurance coverage, taking into consideration accessibility, ease of use, and alignment with enforcement provisions as outlined in federal law as well as the impact on the monthly support obligation."

We agree in principal that incarceration should not be deemed voluntary unemployment; however, this should remain within the purview of states. The quadrennial review should consider research on this issue when developing the guidelines, but the regulations should not prescribe the result of the application of the guidelines. We recommend that 302.56 (c)(5) be removed from the minimum requirements of the guidelines prescribed in (c) to a permissive element of the guidelines.

ERICSA supports 302.56(h) permitting consideration and inclusion of parenting time provisions in guidelines and support orders.

In addition, similar to the permissive consideration of parenting time provisions in 302.56 (h), we recommend as a permissive element that the guidelines address alignment of the child dependent exemption on federal taxes with the health insurance enforcement provisions under federal law.

ERICSA supports providing states flexibility in naming deviation factors.

302.70 – Required State laws.

ERICSA supports increasing the exemption from 3 to 5 years. It permits more flexibility to the state without detriment to the program.

302.76 – Job services.

ERICSA supports this addition to the regulations. Assisting NCPs in obtaining jobs in order to fulfill their support obligation is beneficial to the child support program. ERICSA suggests states be given the option to participate in the job services program. Should a state exercise this option, FFP should be available for employment services. ERICSA suggests any corresponding increase in FFP necessitates a look at the performance measures and incentive allocation; especially as it relates to cost effectiveness.

303.3 – Location of noncustodial parents in IV-D cases.

ERICSA supports the proposed change to include corrections institutions as appropriate locate sources. This is very important as many of the subjects of locate activity are incarcerated.

303.6 – Enforcement of support obligations.

ERICSA respectfully recommends that subsistence needs of NCPs SHOULD NOT be addressed in the area of enforcement of support obligations. This goes well beyond any *Turner v. Rogers* requirement. ERICSA would offer that the consideration of subsistence levels of parents is only appropriate with the use of support guidelines, and moreover, that consideration is for both parents. Furthermore, a NCP's subsistence level cannot be a consideration when a state is imposing automated enforcement procedures such as credit bureau reporting, license revocation, and state tax refund offset. These are highly automated, legally mandated and successful remedies in many states. To require some type of subsistence analysis prior to implementing the procedure would greatly slow down enforcement and require court processes that are currently unnecessary. Modification is the appropriate remedy if there is a subsistence issue. In addition, automated remedies should already have a "contest" procedure to protect the NCPs due process rights.

In new paragraph (c)(4), the proposed regulation provides that the IV-D agency must ensure in a civil contempt proceeding that the Order for the NCP to pay a specific amount of money (child support arrearage) in order to purge him- or herself of contempt, and therefore avoid incarceration, takes into consideration the actual earnings and income *and* the subsistence needs of the noncustodial parent. In addition, it proposes that a purge amount must be based upon a written evidentiary finding that the noncustodial parent has the actual means to pay the amount from his or her current income or assets. According to prefatory language, this proposed provision is intended to assist States, seeking to add due process protections in accordance with the U.S. Supreme Court's recent decision in *Turner v. Rogers,* 564 U.S. __, 131 S Ct. at 2507 (2011).

ERICSA objects to proposed new paragraph (c)(4) referenced above. The proposed regulation is inconsistent with the Supreme Court's recognition in *Turner v. Rogers* that a state may provide various procedures, including appointed counsel, as a way to satisfy due process in civil contempt cases. While we agree that parents should not be incarcerated for civil contempt unless they have the ability to pay and purge him- or herself of contempt, we also believe that the proposed regulation encroaches upon the right of the judiciary. Because there is a well-developed body of state case law regarding contempt, it is not necessary for the federal regulation to assist States by mandating certain due process protections.

We especially object to the requirements as currently written that in a civil contempt hearing, a tribunal must take into consideration the 1) subsistence needs of the noncustodial parent; 2) that a purge amount must take into consideration the subsistence needs of the noncustodial parent; and 3) that there must be a written evidentiary finding regarding the actual means to pay a purge amount from the noncustodial parent's current income or assets.

In Action Transmittal 12-01, OCSE stated: "In light of *Turner*, states continue to have latitude in determining the precise manner in which the state implements due process safeguards in the conduct of contempt proceedings, including the respective roles of the IV-D agency, prosecuting attorneys, and court."

ERICSA believes that OCSE has therefore already issued appropriate guidance to states regarding the *Turner* decision. We object to the additional mandates in new paragraph (c)(4), which exceed the requirements specified by the Supreme Court in *Turner*.

We recommend that OCSE either delete paragraph (c)(4) in its entirety or amend it as follows:

> Ensuring there are procedures requiring the Court to make a finding of the noncustodial parent's ability to pay before it can make a finding of civil contempt.

ERICSA supports the concept that a purge order can contain items other than cash payments to avoid incarceration such as ordering the NCP to take actions related to a job search, job training or the application for social security benefits.

With regard to proposed (c)(5), ERICSA strongly supports permitting states to elect to provide job services to eligible NCPs. As previously stated, it is well known that employment is a key to NCPs making required support payments. However, ERICSA questions why eligibility would be limited to NCPs "who have a current child support order…" We believe all unemployed NCPs with an active IV-D case should be eligible for job services, regardless of the existence of an order for current support or arrears. This expanded allowance would include situations where the support order has not yet been entered due to lack of employment or situations where there are only arrears owed on a support order. Also, we note that the term "current child support order" is confusing.

ERICSA believes that the job services listed in (c)(5)(i) through (vii) are appropriate and support the same.

Pursuant to OCSE's request for comment contained on page 68559 of the NPRM, ERICSA supports the concept of subsidized employment, provided the wages paid to the NCPs are not IV-D funded. However, we question and request clarification regarding the comment that income withholding of this subsidized employment income would not be available. We believe it should be subject to an IWO, again, provided the subsidy is not paid from IV-D funds.

303.8 - Review and adjustment of child support orders.

ERICSA generally supports the concept that a state may elect in its plan to initiate review of an order after notification that the NCP will be incarcerated. ERICSA recommends that states have discretion to determine the time frame of the number of days the NCP is incarcerated as well as to define the term incarceration. ERICSA opposes 303.8(b)(7)(ii) as a mandatory requirement because it is *not* the law in every state that the incarceration of the NCP is a change in circumstance to provide for a downward modification. However, in the final rule there needs to be alignment between 302.56 (c)(5) and this section.

ERICSA supports the proposed deletion of the last sentence in paragraph (d) of 303.8, which prohibits Medicaid from being considered medical support.

Section 303.11 – Case closure criteria.

ERICSA generally agrees with the proposed changes to case closure criteria. The proposals and attendant notice requirements permit IV-D programs to concentrate efforts on collecting support for families in cases when the order is appropriate and collectable.

We note that the term, "current support order", appears only once in the IV-D regulations, in this case closure section, and has caused some confusion over the years. We recommend the term "an order for current support" to distinguish it from an arrears-only order. In regards to section (b) of 303.11 we recommend that on those regulations that "may" allow a state to close a case, that a requirement be added that requires a state to keep a "closure eligible" case open if ongoing payments are being received, unless the IV-D applicant requests closure.

ERICSA supports all of the changes to the case closure regulation with the following exceptions and requests further clarification.

303.11 (b)(3) – ERICSA seeks clarification on how the cost of the care facility is to be determined and if it is to be factored into the subsistence level. In addition, we question if subsistence levels include the receipt of SSA; the steps the IV-D agency should investigate or consider regarding the possibility of retirement plans or financial institution assets; and how combined income (partial disability, VA disability) should be treated?

303.11 (b)8 – ERICSA believes that issues of incarceration should be a separate case closure criteria as it is unique from issues related to disability. In addition, ERICSA has many questions regarding the precise meaning and directive in this section and requests clarification of the following:

- What type of "referrals "are applicable? How does this equate to cases of incarceration as well as disability?
- Is "subsistence level" related to criteria used in state guidelines? Do states have discretion to define?
- The terms "total disability" and "partial disability" have various meanings for the entities who make these ratings. What if the obligor has a partial disability as the sole source of income and that income is less than they would receive if the rating were a total disability? If the intent is to allow closure when income is below a certain level, it should include all circumstances that can contribute to it.
- ERICSA supports having this closure criteria apply to arrears only cases but questions why the phrase "or after the child has reached the age of majority" is in parentheses.

303.11 (b)(9) – ERICSA supports inclusion of (i) and (iii), but not (ii). Closing cases with no potential for collections when the sole income is from (i) SSI or (iii) other needs based benefits not subject to garnishment is appropriate. However, ERICSA believes the current ability to collect from "benefits under Title II" such as SS Retirement or SS Disability benefits should remain available and not be a basis for case closure. Significantly, if the obligor is receiving one of these benefits but not in addition to SSI, this closure ability does not exist.

303.11 (b)(15) – ERICSA agrees with the "expanded" methods of communication with CPs regarding closure. However, two attempts should be made – but only one method should be required if two methods are not available (example: Agency has email address but no other means of communication).

303.31 – Securing and enforcing medical support obligations.

ERICSA supports the proposed language in 303.31 that expands the definition of insurance to include public and private insurance. This change is in line with the current requirements of the ACA. However, there are a number of elements in the current regulation that are in conflict with the ACA, and are not adequately addressed by the NPRM. For example, the reasonable cost threshold of five percent of gross income conflicts with the affordability definition within the ACA, which is eight percent of income. We also question the applicability of ordering cash medical, as outlined in 303.31(b)(2) in light of the ACA and the expansion of the definition of health insurance to include public coverage.

In regard to OCSE's request for comments on the IV-D program's role in carrying out its medical support statutory responsibilities, including the roles of cost allocation between parents and enrolling children, ERICSA recognizes that the IV-D program does have a role in establishing orders for health insurance that make sense for families, but that the program is not in a position to assist families in selecting insurance or enrolling in plans. We believe that OCSE needs to offer more specific guidance on the role of the program in securing and enforcing medical support in light of the ACA. The regulations fall short on this count.

303.72 – Requests for collection of past-due support by Federal tax refund offset.

ERICSA supports this proposed change as it will streamline the offset process and make notice and accounting practices efficient.

303.100 – Procedures for income withholding.

- ERICSA supports this proposed change to the regulation
- ERICSA requests clarification and/or recommends that the regulation state that both the notice may be electronic and that the e-iwo form is an OMB approved form.

304.20 – Availability and rate of Federal financial participation.

- ERICSA supports the additional flexibility in expenses eligible for FFP to carry out the state plan.
- ERICSA supports providing FFP for electronic monitoring. This is a good tool in lieu of incarceration which permits NCPs to work or seek employment/training.
- ERICSA would support that the federal regulation allow, at the State's option, to claim FFP for legal expenses incurred in the representation of NCPs in IV-D legal processes, for example *guardian ad litems* in paternity/establishment actions and defense attorneys in civil contempt or criminal non-support hearings.
- ERICSA supports parenting time provisions at the state option.
- ERICSA does not support the inclusion of "bus fare or other minor transportation expenses" as this gets too far into the weeds, and also presents a significant administrative burden. Such allotments are "one-offs" for appointments and hearings and are not analogous to transportation costs for job training programs or employment services.

304.21 – Federal financial participation in the costs of cooperative arrangements with courts and law enforcement officials.

In line with our concern with changes in 304.23, below, ERICSA questions the inclusion of "corrections officials" in 304.21 and 302.34. Taken in their totality, through its proposed changes to 302.34, 304.21 and 304.23 it appears that OCSE is sanctioning the availability of FFP for the costs of incarceration. ERICSA strongly opposes the availability of FFP for the costs of incarceration. In addition, we request clarification on what services with corrections officials are envisioned by OCSE as it adds "corrections officials" to the term "law enforcement officials" who may enter into cooperative arrangements to support IV-D functions.

304.23 – Expenditures for which Federal financial participation is not available.

ERICSA supports the technical clarification regarding the limitation of FFP for training programs and educational services.

We are disturbed by the striking of section 304.23(i) "Any expenditures for jailing of parents in child support enforcement cases," and the lack of any reasoning for doing so in the NPRM. This could certainly cause local courts and law enforcement to look to the IV-D program to fund the costs of incarceration for non-support. It also seems incongruous with the overall spirit of the NPRM. It is illogical to exclude the costs of counsel for indigent defendants in IV-D actions from FFP while sending a message that incarceration costs are not specifically excluded from FFP. To that end, ERICSA

requests the following clarification: Is the cost of incarceration an allowable expense, and if so, how is this defined (costs of the institution costs, transportation, etc.)?

ERICSA does support, at state option, the costs of counsel for indigent defendants in IV-D actions.

307.11 – Functional requirements for computerized support enforcement systems in operation by October 1, 2000.

ERICSA is adamantly opposed to including Title II benefits to the list of income sources that would require a system change or enhancement to identify NCP income sources and prevent the application of heretofore authorized automated enforcement remedies. Title II benefits should be made available for both current and past due child support payments. (Furthermore, this section again is complicated by the reference to a subsistence level for NCPs, which is not defined, and ERICSA dares to say cannot be specifically defined in a federal regulation.)

Regarding OCSE's stated desire to protect NCPs who are receiving Title 16 only or Title 16 & concurrent Title 2 benefits against unreasonable or over-aggressive IV-D automated collection remedies, ERICSA recommends that the system enhancements be limited to identifying NCPs that are receiving or recently have received Title 16 benefits. Once those cases are separated and removed from an automated enforcement remedy, such exclusion will also include the cases where the NCP is receiving Title 16 and concurrent Title 2 benefits. The concern is that the inclusion of Title 2 benefits in a system change may be prone to error and mistakenly exclude those cases where the NCP receives only Title 2 benefits. Again, Title II benefits should be made available for both current and past due child support payments.

Only "needs based" Title 16 benefits should be included in the list as collections that must be returned to the NCP within 2 days or whatever reasonable time is decided.

Request for Comments on Undistributed Collections

ERICSA is unclear on what "problem" is being addressed by this comment. ERICSA as an organization defers to the states' comments, based on individual state process.

Request for Updates to Account for Advances in Technology

ERICSA supports the expansion of the use of electronic communication, but not to the extent that it conflicts with current federal and state law.

ERICSA supports the various proposed changes contained in Part 301. –State Plan Approval; Part 302. - State Plan Requirements, 303. –Standards for Program Operation, 304. –Federal Financial Participation and 307. –Computerized Support Enforcement Systems. The proposals generally change the requirement to record /verify / maintain records / instruments / contracts etc. from being "in writing" to allowing those instruments to be "reflected in a record". The changes also permit other electronic methods of verification and record keeping of documents; this is in keeping with technologically updated and legally permissible standards.

There are a number of "technical corrections" being proposed to the regulations at Parts 301, 302, 303, and 304. ERICSA generally supports the recommendations except where the technical correction is being proposed in furtherance of proposed substantive changes that ERICSA had previously opposed or had requested clarification. ERICSA supports the time expansion from 30-45 days in 301.15

III. ERICSA's Comments on Remaining Sections of the Regulation

For all other sections not specifically addressed herein, ERICSA either consents to the language as proposed or waives the opportunity to make comment.

IV. Conclusion

The members of the ERICSA Board of Directors and members of the *ad hoc* committee for this review want to thank the OCSE organization for its consideration of our comments and invite OCSE to contact President Carla West at cwest@ywcss.com with any questions or requests for clarification.

Approved by the ERICSA Board on this 14th day of January, 2015.

Carla West

Carla West, ERICSA President